Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-1816

PAUL LABRIOLA,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

EVSEROFF & SONENSHINE
Attorneys for Petitioner
186 Joralemon Street
Brooklyn, New York 11201

WILLIAM SONENSHINE
Member of the Bar of the
Supreme Court of the United
States
Of Counsel

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, entered in the above entitled matter on February 26, 1976 (not yet officially reported)

A. OPINION BELOW

The trial court rendered two opinions below. The first thereof was rendered by Mr. Justice Roberts on September 16, 1974, wherein the original motion to suppress was denied. Said opinion (not officially reported) is appended to this petition as Appendix A.

Following the reopening of the hearing, the Court adhered to its original determination. This opinion (not officially reported), is appended hereto as Appendix B.

No opinion was rendered by the Appellate Court, which unanimously affirmed the judgment below without opinion on February 26, 1976. That Court's order of affirmance of the judgment of conviction is appended hereto as Appendix C.

No opinion was rendered by the New York Court of Appeals since that Court denied permission to appeal to that Court by its certificate dated

March 18, 1976. A copy thereof is appended to this petition as Appendix D.

B. THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment sought to be reviewed herein is the judgment of the Appellate Division, First Judicial Department of the Supreme Court of the State of New York, made on February 26, 1976, and appended hereto as Appendix C.

Jurisdiction in this Court is invoked under Title 28, United States Code, Section 1257 (2) and Rule 19, subdivision 1 of the rules of this Court.

C. THE QUESTIONS PRESENTED FOR REVIEW

1. Did the failure of the prosecution to amend the eavesdropping warrant "as soon as practicable" after discovering that petitioner who was not named in the warrant was being intercepted requiring a suppression of the evidence thereby obtained.

2. Was the eavesdropping warrant of July 27, 1972 obtained without probable cause as to petitioner.

3. Did the failure of the prosecutor to serve a timely 90 day notice of termination of eavesdropping upon petitioner, require suppression of the evidence obtained under various eavesdropping warrants.

4. Did the trial court err in refusing to reopen the eavesdropping hearing to consider the issue of the continued eavesdropping by the police beyond the hourse unequivocally specified in the eavesdropping warrant of July 27, 1972.

D. THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes involved are New York Criminal Procedure Law, Section 700.15, 700.20, 700.50 and 700.65 and Amendments IV and XIV of the United States Constitution and Article 1 Section 6 of the New York State Constitution.

The pertinent portions are set forth in Appendix E of this petition.

E. A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

1. Petitioner was convicted on December 9, 1974 upon his pre-trial plea of guilty to Forgery in the First Degree, before the Hon. Justice Roberts in the New York State Supreme Court, County of New York.

Prior to the entry of the plea of guilty extensive pretrial hearings were conducted before Mr. Justice Roberts upon motions to controvert various eavesdropping warrants issued out of the Supreme Court of Kings County (Vetrano, J.) and to suppress the evidence of the conversations intercepted pursuant to said warrant. The warrants authorized both telephonic interception and "bugging" of oral communications.

Subsequent to the entry of the plea and the sentencing of the defendant, similar hearings were

held in the United States District Court for the Eastern District of New York arising out of the same warrants which had formed the basis of a Federal prosecution against this petitioner and others*.

Based upon facts revealed at those federal hearings, petitioner moved before Justice Roberts in the State Court to reopen the original hearing before hime in order to raise 2 issues not previously raised in the State Court viz, the timeliness of the 90 day notice of termination of the eavesdropping and further, the legal affect of continued bugging by the police beyond the hours specified in the eavesdropping warrant.

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* Petitioner was thereafter convicted in the Federal Court following the denial of motions to suppress the conversations intercepted under the same warrants. That conviction was affirmed by the United States Court of Appeals for the Second Circuit, March 4, 1976 and is the subject of a separate petition for certiorari involving the same warrants and the same issues. Said petition for certiorari is presently pending in this Court, sub judice under petition no. 75-1394
It is requested that said petition be considered together with the instant petition.

The trial court reopened the hearing solely with respect to the 90 day notice issue, but refused to reopen the hearing with respect to the issue involving the bugging beyond the hours specified in the warrants. The Court thereafter adhered to its original determination denying all motions to controvert the warrants and to suppress evidence thereby obtained.

Thereafter all of these materials were the subject of a timely appeal to the Appellate Division, First Department, of the Supreme Court of the State of New York. That Court, on February 26, 1976 unanimously affirmed the judgment below without opinion. Thereafter a timely application was made to the New York Court of Appeals seeking leave to appeal to that Court. On March 18, 1976, Hon. Sol Wachtler, an Associate Judge of the Court of Appeals, denied permission to appeal to that Court, but noted in his certificate, denying leave, that the various constitutional issues raised upon the appeal

below were argued as part of the application for leave to appeal to the New York Court of Appeals.

Petitioner is presently incarcerated pursuant to said judgment of conviction.

F. THE STAGES OF THE PROCEEDINGS IN WHICH THE ISSUES INVOLVED WERE RAISED AND THE MANNER IN WHICH THEY WERE RAISED

1. The issue with respect to the validity of the eavesdropping warrants (Points One and Two) were raised by timely pretrial motions in accordance with the Criminal Procedure Law of the State of New York.

2. The issues with respect to the 90 day notice and the bugging after the hours specified in the orders (Points Three and Four) were raised subsequent to the sentencing as a result of information derived from the hearings of the same warrants in the Federal Court. The State trial court, thereafter reopened the hearing to the extent of hearing the 90 day issue, but refused

to reopen it with respect to the issue relating to bugging after the hours specified in the various warrants.

G. ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(See next page)

POINT ONE

THE EAVESDROPPING WARRANT DATED JULY 5, 1972 WAS EXECUTED IN VIOLATION OF PETITIONER LABRIOLA'S CONSTITUTIONAL AND STATUTORY RIGHTS. THE EVIDENCE THEREBY OBTAINED SHOULD BE SUPPRESSED AS WELL AS THE EVIDENCE OBTAINED UNDER THE FOUR EAVESDROPPING WARRANTS THEREAFTER OBTAINED AS A RESULT THEREOF.

On July 5th, 1972, Mr. Justice Vetrano, sitting in Supreme Court, Kings County, signed a warrant authorizing the District Attorney of New York County to intercept telephone conversations over a semi-public telephone, number 377-9840, at S.L.A. licensed bar in Brooklyn known as the 1-2-3-4 Club.

The warrant was predicated upon allegations by Assistant District Attorney, Leonard Newman that one Joseph Martino, acting under the code name "Paul", was using that telephone to converse with an alleged informant named Stanley Reinhardt for illicit dealing in the alleged Unlawful Possession and Sale of certain U.S. Postal Bearer Bonds and unspecified Industrial Bonds.

The warrant authorized the interception of Martino's conversations over said telephone and "his co-conspirators, agents and associates", in connection with the aforementioned crimes.

Although the warrant was effective for 30

days commencing July 5th, it was not implemented until July 11th, because the subject telephone was out of order until July 11th.

Prior to implementing the order, the police officers who were to overhear and record the telephone communications were instructed to listen to previously obtained recordings of conve sations between Reinhardt and Martino in order to become familiar with the voice of Martino.

Additionally, Seargent Bicina, who was supervising the interceptions, was told by Assistant District Attorney Newman to instruct his men not to record privileged or social conversations, but to record:

> "all conversations with respect to Joseph Martino, a person known to us at that time as "Ralph" and that anyone who responded to the name of "Paul" when that number is called, and discussed the theft of negotiation or disposition of stolen securities, or anyone calling that number and engaging in conversations with the inside parties about the theft or disposition as to the disposition or negotiation of stolen securities."

Newman further testified as to instructions given him by dealing with conversations by persons named Paul. He stated:

> "Q. Now, did you give them any instructions as to what they were

> to do if somebody called Paul and answered the phone and they realized that is your people overhearing the conversation realized that the Paul who answered the phone was not Joe Martino?
>
> "A. If that person who responded to the name Paul when called, if he was engaged in a conversation concerning stolen securities in any respect whatsoever, that call was to be recorded."

The police also undertook a surveillance of the 1234 Club. They learned, by July 6th (prior to commencing telephone interception) that Paul Labriola frequented the Club and had a police record involving stolen checks.

On July 11th, the telephone interception began. Among the calls intercepted that day were three to a party named "Paul". The voice of "Paul" was the same in all three calls. Detective Huller did not know who either party was.

Although the tapes of telephone conversations between Reinhardt and Martino were readily available to the officers overhearing the 1234 Club telephone, they never listened to it after the tap was installed to compare the voice of Martino with the voice of "Paul" on the 1234 tap to ascertain whether "Paul" was the Martino named in the July 5th warrant or some other "Paul" who was not named in the order.

Detective Huller, after listening to the entire first conversation between the unknown

"Paul" and the unknown other party, said he didn't know whether the conversation pertained to his investigation.

Huller also listened to the entire second conversation on July 9th, although he did not know who "Paul" or the other party was. He stated that there was no reference to industrial bonds or postal bonds which were the subject of the eavesdropping warrant. He attempted to justify his listening to the conversation by saying that he felt reference to the "piece" as "I.D's" would have had a bearing on the case.

The third conversation was also recorded without knowing who the parties were. Huller described the conversations as "cryptic" because there was reference to "I had to get somebody out" and "Did he pick up the things he was supposed to pick up?" As Huller put it "That could have a bearing. I don't know what, but possibly it could."

Huller testified that Detective Boyle, after hearing "Paul" arrange over the tapped phone to meet someone, followed "Paul" to the appointed place.

On July 12th, two more conversations of the same "Paul" were intercepted in toto between "Paul" and one "Ted".

The entire first conversation simply related to one of the parties arranging to meet the other at "Nick's" in 15 minutes.

The second conversation of July 12th was an unkown male calling into "Paul". The unknown

male said "They paid them" and I need a couple of bucks", Paul arranged to meet the unknown male at a candy store.

Huller, although stating that he wanted to know who "Paul" was and whether the voice was Martino's, acknowledged that he would have listened to the entire conversation even if it turned out not to be Martino. (Huller still did not bother to listen to the Reinhardt tapes containing Martino's voice to compare it with the voice he was intercepting at the 1234 Club.

Huller then left the plant immediately after hearing "Paul" arrange to meet the unknown male at a candy store on Coney Island Avenue. He followed the man who left the 1234 Club to the place referred to in the tapped conversation. The man was Paul Labriola.

Huller later informed Seargent Bicina that the "Paul" they were tapping was probably Paul Labriola and not Joseph Martino.

On July 14th, he intercepted a conversation between Paul Labriola and a person he believed was Joseph Martino at the 1234 Club. He, now admittedly knew that the "Paul" he had been recording on the wire tap was not in fact the Joe Martino referred to in the July 5th warrant.

Thus by certainly no later than the 4th day of the intercepting calls, and perhaps as early as the 2nd day of interception, the police knew they were tapping the conversation of a party not named or authorized to be tapped in the July 5th warrant, to wit, the conversation of Paul Labriola.

At this point the police were under a constitutional as well as a statutory mandate to discontinue tapping Labriola's conversations until they obtained a warrant to intercept Labriola's conversations.

The police, however continued to intercept Labriola's conversations between July 14th and July 27th without obtaining a warrant authorizing such tapping.

More specifically, between July 14th and July 27th, Detective Huller and his fellow officers intercepted and recorded twenty (20) completed phone conversations to which Labriola was a party. None of the other parties to whom Labriola spoke were known to the police.

Seargent Bicina testified that by July 13th, or in any event not later than July 14th, he informed Assistant District Attorney Charles Clayman (who was supervising the investigation) that based on a series of tapped conversations he now felt that "it was Paul Labriola and not the Joe Martino known as "Paul" whose conversations they had been intercepting and "we felt that there should be an amendment" Clayman replied that it would be done when the order was due for renewal.

Thus on July 14th the District Attorney (after only four days of intercepting conversations) delayed seeking a modification of the warrant until July 27th - a thirteen day period in which they continued without abatement or minimization to unlawfully intercept Labriola's conversations. In fact on July 14th, Assistant District Attorney, Clayman specifically instructed Bicina to none-

theless continued to intercept Labriola's conversations.

Two of those post July 14th conversations were submitted in support of the amended order signed by Judge Vetrano on July 27th (see Point Two, supra).

The issue here presented is whether the police had a constitutional right to continue, without applying for an amended order, to intercept Labriola's telephone conversations up to July 27th where they knew by July 12th or at the latest July 14th, that Paul Labriola was not in fact Joseph Martino (a/k/a Paul), that was named by Mr. Justice Vetrano in his July 5th warrant.

Certain preliminary observations are in order in considering this issue:

(a) The July 5th warrant was predicated exclusively upon information relating to the theft of specifically described Postal Bearer Bonds and an undetermined quantity of "industrial" bonds. No other type of stolen property is described in the affidavit or the warrant.

Thus the conversations to be intercepted must be deemed limited to authorizing only "a particular description of the type of communications sought to be intercepted" (Criminal Procedure Law §700.30). To allow the scope of the warrant to go beyond such limitations would result in a constitutionally prohibited general warrant (U.S. Const., Amendments 4 and 14; N.Y. Constitution Article 1, §6 and 12; Berger v. New York, 87 S. Ct. 1873, 388 U.S. 41).

(b) The two July 21st conversations recorded and submitted to Mr. Justice Vetrano on July 27th in support of the amended order to include Labriola as a party whose conversations might be intercepted were clearly conversations outside the scope of the July 5th warrant.

By Mr. Clayman's own affidavit of July 27th those conversations could have related to stolen checks or any other kind of stolen security (affidavit, p. 4). Indeed Mr. Clayman's affidavit of July 27th (P. 5) interprets the conversation of July 21st to refer to some new future theft of an unspecified quantity of undescribed securities -- certainly not under any interpretation the previously stolen Postal Bonds or industrial securities.

Thus the intercepted conversations related to crimes not specifically referred to in the July 5th order. As such, an amended order should have been obtained "as soon as practicable" after July 12th or certainly after July 14th. Yet the District Attorney when apprised of this by Seargent Bicina in July 13th or July 14th, deliberately and consciously determined not to seek an amendment until July 27th and specifically directed that the wiretapping of Labriola's conversations nonetheless continue unabated.

Accordingly, we respectfully urge that the conversations of Paul Labriola, intercepted under the July 5th order and all those which followed be suppressed as well as any evidence derived therefrom.

POINT TWO

THE EAVESDROPPING WARRANT OF JULY 27, 1972 ISSUED BY MR. JUSTICE VETRANO, WAS NOT SUPPORTED BY PROBABLE CAUSE AS TO PAUL LABRIOLA

Mr. Justice Vetrano had originally issued a warrant for eavesdropping, dated July 5, 1972. The order did not name Paul Labriola. During the course of the eavesdropping under that warrant, the police intercepted various calls alleged to be those of Paul Labriola. Predicated upon those interceptions (see Point One, supra), the District Attorney of New York County applied for a further warrant, renewing and amending the July 5th warrant, so as to include Paul Labriola. On July 27, 1972, Mr. Justice Vetrano granted that order, which now included authority to install a bug into the 1234 Club, as well as to continue previously authorized wiretapping.

It is, of course, axiomatic that an order for eavesdropping must be predicated upon probable cause. Additionally, the probable cause must appear within the four corners of the supporting affidavits when, as in the present case, the court took no further testimony or evidence prior to issuing the order.

Turning then to the July 27th order, we note the following with respect to its applicability to Paul Labriola.

The factual affidavit supporting the order

was that of Assistant District Attorney Charles Clayman. After reciting the prior order of July 5th, he went on to indicate that two conversations of a person described as "Paulie" were intercepted pursuant to the prior warrant. The first of these conversations referred to in paragraph 2(b) at pages 3 and 4 of Mr. Clayman's affidavit was as follows:

> "At 2:55 p. m. on July 21, 1972, Paulie (co-conspirator of Joe Martino, see paragraphs 23 and 24 of July 3, 1972 affidavit) made the following outgoing call.

Paulie (In)	I'll meet you 9 o'clock at Coney Island "L&M"
Leon (Out)	Heh Heh
In	The luncheonette
Out	Yeah yeah what's new otherwise
In	Oh nothing
Out	Did you get what you were suppose to get?
In	We're getting them. He's got them, and we're getting tonight, so eh remember that thing that you needed that little stamp, do you still have it?
Out	Eh come again
In	Do you know the thing you needed the last time the stamp
Out	I needed
In	Yeah remember the last batch a long time ago
Out	Oh yeah yes yes yes yes yes
In	Do you still have that stamp?
Out	Eh' yes I have it right here

"In	Oh good because that's what we need
Out	That one with the eh
In	Yeah
Out	Wait wait a minute, wait a minute, I have the one with the date.
In	That's the one we need
Out	What about the other one
In	That one we needed the last time, we need again because they've the same thing."

To begin with we note that there is no allegation that the "Paulie" referred to is claimed to be Paul Labriola. Moreover, the conversation is between "Paulie" and a person named Leon. It must be born in mind that the original warrant authorized only the interception of calls involving Joe Martino and his co-conspirator, and that must be limited, for constitutional purposes, to the specific crimes being investigated, namely, allegedly stolen postal bearer bonds and industrial bonds.

Thus, it is immediately apparent that the parties named in the original order are not the parties to this conversation. Moreover, the conversation cannot be regarded as one having anything to do with United States postal bonds or industrial bonds.

The conversation, at most, is highly equivocal from which no inference of criminal conduct can or should be constitutionally permissible. The purported interpretation that stamps are used in connection with stolen bonds can give rise, at most, to a suspicion of improper

conduct, but even that is nothing more than a surmise. To hold otherwise, would be to hold that a conversation in ordinary English language, on its face innocuous could become a basis for probable cause merely on the subjective opinion of a Police Officer seeking to convert a guess into a factual basis at the level of probable cause. In any event, it must not be overlooked that the conversation in no way can give rise to an inference that the subject matter under discussion is postal bonds or industrial bonds as opposed to any other bonds if indeed it can be interpreted by any stretch of the forensic imagination to relate to bonds at all.

Even assuming that the quoted conversation could relate to criminal conduct involving stolen bonds other than postal bonds or industrial bonds, it would necessarily have to be treated as evidence of a new crime, not the subject matter of the original warrant and, consequently must be suppressed because the District Attorney did not obtain the amended order "as soon as practicable". (Criminal Procedure Law, Section 700.65: Point One, supra).

The second quoted conversation, occurring later the same day and found in paragraph 2(c), page 5 of Mr. Clayman's affidavit sheds no further light on the issue of probable cause. That conversation, in its entirety is as follows:

"At 10:25 p.m. on July 21, 1972, Paulie received the following call:

Joe	When you send the other thing put in an envelope but put tissue around it

Paul	I got the blank but I don't know if the other guy is around to type it up
Joe	Send it airmail special delivery. Send it to 160-20 Sepulveda Blvd. That's my name your using Joe Antonakes. I ran into something out here, I think I got something real big in the broke. It's worth about 200 big ones. I'll see you next week. Who do you have to wait for? Leon.
Paulie	Yeah he has to do the typing I met Leon tonight."

The arguments previously urged as to the first conversation are again applicable here.

Once again, the District Attorney sought to raise a conversation essentially innocuous on its face when taken literally, to the constitutional level of probable cause by interpreting the words "something real big in broke" as a criminal conversation allegedly dealing with stolen securities in brokerage houses and their shipment through the mail in the future. Objectively viewed, as it must be, the proposed interpretation is in reality, to paraphrase an old saying, a case of evil being in the eye of the beholder. Constitutional standards have always required an objective interpretation rather than a subjective one. From the point of view of objective interpretation, one can offer any number of interpretations of that conversation, ranging from the sublime to the ridiculous and come no closer to probable cause than the merest of surmise and conjecture.

The order on its face, patently lacks a fac-

tual basis for probable cause to believe that Paul Labriola was a conspirator of Joseph Martino in connection with the claimed theft and possession of stolen postal bonds or stolen industrial bonds (Criminal Procedure Law, Sections 700.15, 700.20 and 700.25; Title 18 U.S. Code,,Section 2518; U.S. Constitution Article 4 and 14; New York State Constitution Article 1, Paragraph 6 and Paragraph 12).

It is therefore respectfully urged that the warrant of July 27, was not properly issued. Such warrant along with the succeeding warrants authorizing eavesdropping as to Paul Labriola should be held to be invalid and the evidence obtained thereunder or derived therefrom should therefore be suppressed in their entirety.

POINT THREE

THE FAILURE OF THE DISTRICT ATTORNEY TO SERVE THE STATUTORY 90 DAY NOTICE UPON THE APPELLANTS FOLLOWING THE TERMINATION OF THE EAVESDROPPING IN THE 1234 CLUB REQUIRES THAT THE EVIDENCE OBTAINED UNDER THE JULY 27th ORDER AND THOSE WHICH FOLLOWED BE SUPPRESSED

This phase of the case deals with Section 700.50 subd. 3 of the Criminal Procedure Law which provides that "in no case later than 90 days after the termination of an eavesdropping warrant or expiration of an extension order", written notice must be personally given to each person named in the warrant.

The pertinent facts dealt in this matter are the following:

1. On July 5th Mr. Justice Vetrano issued the first of a series of 5 eavesdropping warrants. That first order did not name petitioner Labriola.

2. On July 27th, Mr. Justice Vetrano amended and extended the July 5th order so as to include petitioner Labriola.

3. Three subsequent orders were thereafter issued each in turn dependent upon the prior order.

Det. Huller testified at the hearing that in executing the July 27th order for eavesdropping at the 1234 Club the eavesdropping plant was shut down and no further eavesdropping was undertaken after September 1st.

The reason for the termination was because the police knew that the 1234 Club was closed and nobody was there.

It is our contention herein that since the eavesdropping was deliberately terminated by September 1st the petitioner Labriola thereafter within 90 days from September 1st was entitled to the statutory notice pursuant to Criminal Procedure Law Section 700.50. Mathematically computed the 90 day period following September 1st would terminate on November 29th.

The minutes of the Supreme Court proceedings wherein the notices were served upon Labriola indicate that such service, occurred on December 13th, 1972, two weeks after the expiration of the 90 day period.

People v. Huston, 34 N.Y. 2d 116, 356, N.Y. Sub. 2d 272. New York Court of Appeals dealt with the question of giving the statutory notice. Judge Rabin writing for a unanimous court said at 34 N.Y. 2d 121:

> "The People admit that they did not give the written posttermination notice required by the statute. While we may assume that the lack of such notice might ordinarily require suppression of the evidence obtained as a result of the warrant (see People v. Tartt, 71 Misc. 2d 955, 336 N.Y.S. 2d 919, supra), we believe that the special circumstances present in this case

"compel a different conclusion."

The Court than detailed the unique circumstances which governed its decision in this case. The case at bar however, presents no such extraordinary situation upon which the government can rely to relieve itself of the fault. The underlying juridical philosophy applicable here are in words expressed in U.S. v. Giordano, 469 F. 2d 522, 530:

> "We cannot relegate provision after provision to oblivion by terming each a mere 'techincality' - or else we leave the statute a shadow of itself, an apparition without substance'".

An interesting corollary is found in the case of Olmstead v. U.S., 277 U.S. 438, 458, 48 S.Ct. 564, 575:

> [when]"government becomes a law breaker, it breeds contempt for law".

See also People v. Kennedy, 75 Misc. 2d 10 347 N.Y. Supp. 2d 327.

It is therefore respectfully submitted that the failure to give the 90 day notice was a matter of substantial right designed to prevent the Government from encroaching upon constitutionally guaranteed rights of privacy by giving notice of recent eavesdropping to persons named in an eavesdropping warrant.

It would therefore follow that the evidence obtained under the July 27th order of Mr. Justice Vetrano and those which follow it and which are dependent upon it should be suppressed.

POINT FOUR

THE COURT BELOW ERRED IN REFUSING TO RE-OPEN THE EAVESDROPPING HEARING TO CONSIDER THE ISSUE OF THE CONTINUAL EAVESDROPPING BY TH E POLICE BEYOND THE HOURS SPECIFIED BY MR. JUSTICE VETRANO IN HIS SECOND ORDER, DATED JULY 27, 1972

Mr. Justice Vetrano's second eavesdropping order (dated July 27, 1972) which named petitioner as a person whose conversations were to be intercepted within the 1234 Club, specifically provided that such bugging "not occur after 7:30 A. M. on any day..."

At the original hearing, counsel requested the log entries of petitioner's intercepted conversations The District Attorney objected. The Court granted the application only to the extent of directing the prosecution to turn over the log reports of conversations intercepted under the first order of July 5, 1972.

Subsequently, petitioner learned during the hearings before Judge Costantino in Federal Court, that the police continually intercepted petitioner's

conversations in the 1234 Club well beyond the 7:30 P. M. cut-off period specified in Judge Vetrano's second order, dated July 27th.

Judge Costantino then held:

> "All conversations overheard after 7:30 P. M. in violation of the court order of July 27, 1972 are hereby suppressed."

Thereafter petitioner moved to reopen the eavesdropping hearing before Mr. Justice Roberts. Counsel's affidavit in support of that application stated:

> "With respect to the bugging issue, your affirmant had made numerous requests for all of the logs involved in the eavesdropping orders. The District Attorney opposed that application and the Court originally denied application. Subsequently, the Court permitted counsel to have those logs which pertained to the first wiretapping order, leaving further logs to be delivered only if deemed necessary by the Court. As matters developed [the assistant district attorney] Mr. Genge advised your affirmant that the logs involved in the second order (the bugging order) were not necessary because there was no intention, upon that particular trial to offer any of the conversations obtained as a product of the bugging. Upon reliance thereon, your affirmant made no further demands for the logs of the bugged conversations."

The motion was denied.

As further indicated in counsel's affidavit in support of the motion to reopen the eavesdropping hearing before Mr. Justice Roberts:

> "The evidence can be presented briefly and without undue delay. Essentially it will consist of the logs of the bugged conversations, which, on their face indicate the continuous bugging after the 7:30 P.M. [and] the testimony of the police officers to confirm the post -7:30 P.M. bugging...."

We respectfully urge that the second order of Mr. Justice Vetrano, dated July 27, 1972 was blatantly and inexcusably violated by the police. The circumstances thereof should have been inquired into by the Court below and the legal effects upon motion to suppress should have been decided by that Court.

In People v. Holder, 331 N.Y.S. 2d 863, the Court referring to a failure to follow minimization during a court ordered wiretap stated at page 570:

> ""The intercept was never cut off and the surveilling agent did not even attempt 'lip service' compliance with the statutory mandate, but rather

> "completely disregarded it..... from the record before this Court, at appears that the police intended to glean every conceivable shred of relevant conversation from every telephone call and thus they turned the eavesdropping warrant into a general search warrant and totally disregarded the direction in the warrant..... Such a practice cannot be countenanced by this Court."

The Court suppressed all the conversations intercepted in the Holder case (supra) stating that "only by imposing such a severe penalty will compliance in the future be guaranteed".

If this Court sanctions the actions of the prosecution in a case such as this it will be permitting court approved violations of an individual's Fourth Amendment Rights.

There can be but one remedy in a situation such as this; that is, total suppression of each and every conversation intercepted as well as those developed following these improperly seized conversations.

We respectfully urge that the original hearing below should be reopened and an evidentiary hearing

held to determine the circumstances and legal consequences of the continued bugging after the cut-off hour specified in Judge Vetrano's order.

CONCLUSION

THE PETITION FOR CERTIORARI HEREIN SHOULD BE GRANTED

Dated: Brooklyn, New York
June, 1975

Respectfully submitted,

EVSEROFF & SONENSHINE
Attorneys for Petitioner

WILLIAM SONENSHINE, ESQ.
Of Counsel

APPENDIX- A

OPINION OF MR. JUSTICE ROBERTS
DENYING MOTION TO SUPPRESS

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 42

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THE PEOPLE OF THE STATE
OF NEW YORK

-against- Indictment No.
6550/72

PAUL LABRIOLA,

Defendant.

----------x

BURTON B. ROBERTS, J. :

Defendant Paul Labriola has moved to suppress evidence obtained as a result of two electronic eavesdropping orders for wiretaps on telephone number 377-9840, located inside a bar known as the 1-2-3-4 Club located at 1234 East 15th Street, Brooklyn. The first order, dated July 5, 1972, authorized the interception of the conversation of one Joe Martino and his co-conspirators, including one "Ralph", relating

to the procurement and distribution of stolen securities. The second order, dated July 27, 1972, was in the nature of a renewal and amendment of the first order, with the only pertinent addition being the naming of the defendant, Paul Labriola, as a co-conspirator whose conversations, along with those of Martino, "Ralph" and the co-conspirators of all three men, were thereby authorized to be intercepted. (The second order also provided for the installation of an electronic "bugging" device inside the 1-2-3-4 Club. No seperate issues have been raised with respect to this aspect of the second order.)

Defendant's motion addressed to the issuance of the wiretap conceded the validity of the first order as far as the interception of conversations of Martino and "Ralph" with each other or with third parties were concerned, (Transcript, p. 3). He contended, however, that the

officers monitoring the wiretap under the first order did not have the right to intercept the conversation of anyone else, including defendant, with third parties and that, as a result, the second order, which was based in part upon the presentation of these conversations to the issuing Justice, was therefore invalidated. He also maintained as a seperate argument that the police officers who executed the wiretaps failed to minimize the interception of non-pertinent conversations, rendering the entire body of evidence obtained from these wiretaps inadmissible. See e.g. United States v. Tortorello, 480 Fed. 764 (2d Cir. 1973).

As a result of these contentions, this Court conducted an evidentiary hearing into the circumstances under which the two eavesdropping orders were obtained and executed. This hearing included testimony by two Assistant District At-

torneys who obtained the order and supervised its execution, testimony by the monitoring police officers, a playing of all relevant conversations obtained under the first order and an examination by the Court of logs kept by the monitoring officers. As the evidence developed during the course of this hearing, various new contentions by the defendant were made as old ones were apparently put to rest by the evidence. As the matters further unfolded, even these new defense contentions changed like Sahara's shifting sands, with the result being that the issues presently before me are not clearly defined. What can only be done now, therefore, is to deal with so many of the original issues recited above and the points clearly raised in defendant's written brief as are worthy of comment.

The following constitutes this Court's findings of fact and conclusions of law. According to the affidavit of Assistant District Attorney Newman

in support of the application for the first order, Martino stated to the informant that if he himself did not answer the subject telephone, he would receive messages left over that telephone under the code name of "Paul". This fact, taken together with what defendant concedes was the sufficient probable cause to tap Martino's operation for the disposition of stolen securities over the telephone, gave the issuing Justice probable cause to believe Martino had confederates or, at the very least, helpful individuals who would accept messages from callers interested in the securities. Accordingly, I conelude from an examination of the affidavit in support of the July 5th order that it properly authorized the interception of conversations over the subject telephone to which Martino and "Ralph" were not a party. United States v. Kahn, U.S. , 94 S. Ct. 977 (Feb. 19, 1974,) cited by the People

in support of this conclusion, is directly in point and controlling here. Additionally, the evidence at hearing revealed that at the time the first order was obtained and during at least the initial period of its execution the law enforcement officials invilved reasonably believed that the name "Paul" was either an alias used by Martino or a code word used by Martino and his associates to identify callers who were interested in stolen securities. Inasmuch as defendant's first name was Paul and he identified himself as such over the telephone, the police had the right to begin to listen to his conversations over the subject phone until their subject matter was established. Of course, once he began talking about stolen securities, his status as a member of the conspiracy, in addition to Martino and Ralph, was sufficiently established and his pertinent conversations with anyone were subject to interception

under the order. Moreover, the tapes themselves further revealed that on July 14th, the fourth day after installation of the tap, the officers intercepted a pertinent conversation between the defendant, Martino and Ralph which established the relationship of the three as co-conspirators. Certainly, after this point, the defendant's status as a member of the conspiracy was clear and his pertinent conversations with anyone were subject to interception under the order.

Defendant contends that as soon as his identity as co-conspirator became known, the authorities had the obligation to immediately amend the July 5th order to name him before they could listen to any of his further conversations with third parties. There is no such requirement to perform what amounts to a merely ministerial act. (CPL § 700.65; People v. DiLorenzo, 69

Misc 2d 645.) Defendant was named in the second order. No claim is made here that the People failed to comply with the provision of the statute governing the giving of notice.

Defendant also contends that the authorities failed to properly amend the first order to include conversations pertaining to industrial bonds, arguing that the probable cause for that order dealt with stolen postal bearer bonds. This statement is factually incorrect, inasmuch as the Newman affidavit revealed to the issuing Justice that Martino had stated to the informant that he also had industrial bonds for sale. The order itself was, properly, unrestricted as to the exact species of stolen securities that would be pertinent. It is clear that an amendment is unnecessary for each transaction which is part of a common criminal enterprise and defined by the same Penal Law provisions. United States v. Tortorello, 480

Fed. 764, 782-783 (2d Cir. 1973).

After listening to the witnesses who testified at the hearing, I find that the monitoring officers were properly and adequately instructed by Assistant District Attorney Newman and Sargeant Bocina as to how they were to minize the interception of conversations which were not subject to proper interception under the first order. After listening to the tapes and examining the logs, I find that the police exercised exemplary good faith in minimizing the interception of non-pertinent conversations and that the orders were properly executed.

For the foregoing reasons, the defendant's motions are in all respect denied.

The Clerk of the Court is directed to forward a copy of this order to the District Attorney and to the attorney for the defendant.

Dated: September 16, 1974

BURTON. ROBERTS
J.S.C.

APPENDIX -B

ORDER OF AFFIRMANCE ON APPEAL

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on February 26, 1976.

Present-Hon. Harold A. Stevens, Presiding Justice
Harold Birns
Samuel J. Silverman
Louis J. Capozzoli
J. Robert Lynch, Justices.

The People of the State of New York, Respondent,	:	Order of Affirmance on Appeal from Judgement
-against-	:	1928-30
PAUL LABRIOLA, Defendant-Appellant.	:	

Appeals having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Burton B. Roberts, J.), rendered on December 9, 1974, convicting him of the crime of forgery in the first degree (2 counts), and from two orders of said Court entered on March 14 and May 14, 1975, denying defendant's motions to reopen the suppression hearings, and said appeals having been

argued by Mr. William Sonenshine of counsel for the appellant, and by Mr. Amelia C. Anzalone of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment and orders so appealed from be and the same are hereby, in all things, affirmed. The case is remitted to the Criminal Term of the Supreme Court, New York County, which shall direct defendant to surrender himself in order that execution of the judgment shall be commenced or resumed
(CPL § 460. 50 (5).

E N T E R :

HYMAN W. GAMSO
Clerk.

Counsel for appellant is referred to § 606. 5 , Rules of the Appellate Division, First Department.

APPENDIX-C

CERTIFICATE DENYING LEAVE TO APPEAL

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. SOL WACHTLER, Associate Judge

The People of the State of New York,

-against-

CERTIFICATE DENYING LEAVE

PAUL LABRIOLA

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460. 20 and upon the record and proceedings herein, * there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
March 18, 1976

Associate Judge

* Description of Order: Judgment of Supreme Court, New York County, December 9,

CERTIFICATE DENYING LEAVE TO APPEAL
Continue

1974; affirmed by Appellate Division, First Department, February 26, 1976. All those issues including those involving federal Constitutional questions which are raised before the Appellate Division were argued as a part of the application for leave to appeal to this Court.

APPENDIX-D

OPINION OF MR. JUSTICE ROBERTS
ON MOTION FOR RE-HEARING

SUPREME COURT : NEW YORK COUNTY
TRIAL TERM : PART 42

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THE PEOPLE OF THE STATE
OF NEW YORK

-against- Indictment No.
6550/1972

PAUL LABRIOLA,

Defendant.

----------x

BURTON B. ROBERTS, J.:

On consent of the District Attorney, defendant's motion to suppress evidence obtained as the result of electronic eavesdropping, heretofore denied by this Court, has been reopened to include the issue of whether the notice given defendant pursuant to CPL § 700.50(3) on December 13, 1972 was timely.

Defendant contends that "since the eavesdropping was deliberately terminated by Septem-

ber 1st, the defendant was thereafter within 90 days from September 1st, [i.e. by November 29, 1972] entitled to the statutory notice pursuant to Criminal Procedure Law Section 700.50."

Upon consideration of this issue, the decision denying defendant's motion to suppress is adhered to. While prior eavesdropping warrants were in effect until September 2, 1972 and were not immediately renewed, it appears that on September 11, 1972 the issuing Justice issued a further eavesdropping warrant for the same telephone, individuals, subject matter and premises as prior orders, which was in effect between September 12, 1972 and October 10, 1972, and pursuant to which communications were intercepted. This latter warrant contained provision postponing any notice to be given pursuant to the prior warrants until the termination of the newly reundertaken eavesdropping. I conclude,

therefore, that the reasonably prompt recommencement of eavesdropping for the same telephone, individuals, subject matter and premises which occurred here constitutes "exigent circumstances" for the postponement of notice pursuant to CPL § 700.50(4). I conclude further that the only logical interpretation of the intent and effect of the postponement provision contained in the September 12th warrant was to permit notice of any prior eavesdropping to be served within a ninety-day period of the October 10th termination date of the September 12th warrant, i.e., by January 7, 1973. Hence, the notice given December 13, 1972 was valid.

The Clerk of the Court is directed to forward a copy of this decision to the attorney for the defendant and to the District Attorney.

Dated: May 14, 1975 BURTON B. ROBERTS
J.S.C.

APPENDIX- E

§700.15 Eavesdropping warrants; when issuable

An eavesdropping warrant may issue only:

1. Upon an appropriate application made in conformity with this article; and

2. Upon probable cause to believe that a particularly described person is committing, has committed , or is about to commit a particular designated offense; and

3. Upon probable cause to believe that particular communications concerning such offense will be obtained through eavesdropping and;

4. Upon a showing that normal investigative procedures have been tried and have failed, or rasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ; and

5. Upon probable cause to believe that the facilities from which, or the place where, the communications are to be intercepted, are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

§700.20

***2. The application must contain:

(a) The identity of the applicant and a statement of the applicant's authority to make such application; and

(b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an eavesdropping warrant should be issued, including (i) a statement of facts

establishing probable cause to believe that a particular designated offense has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of the communications sought to be intercepted, and (iv) the identity of the person, if known, committing such designated offense and whose communications are to be intercepted; and***

§700.50

***3 Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in subdivision four, written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant and such other parties to the intercepted communications as the justice may determine in his discretion is in the interest of justice. The justice, upon the filing of a motion by any person served with such notice, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and warrants as the justice determines to be in the interest of justice. ***

§700.65

***4. When a law enforcement officer, while engaged in intercepting communications in the manner authorized by this article, intercepts a

communication which was not otherwise sought and which constitutes evidence of any crime that has been, is being or is about to be committed, the contents of such communications, and evidence derived therefrom, may be disclosed or used as provided in subdivisions one and two. Such contents and any evidence derived therefrom may be disclosed or used as provided in subdivisions one and two. Such contents and any evidence derived therefrom may be used under subdivision three when a justice amends the eavesdropping warrant to include such conetents. The application for such amendments must be made by the applicant as soon as practicable. If the justice finds that such contents were otherwise intercepted in accordance with the provisions of this article, he may grant the application.

Constitution of the U. S.

Amendment [IV]

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Constitution of the U. S.

Amendment XIV

***No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State depirve any person of life, liberty or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws. ***

New York State Constitution

Article 1 §6

No person shall be deprived of life, liberty or property without due process of law.